

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
RUTH A. HARVEY
Director
TRACY J. WHITAKER
Assistant Director
MATTHEW J. TROY (GA SBN 717258)
Senior Trial Counsel
Civil Division, Commercial Litigation Branch
U.S. Department of Justice
P.O. Box 875, Ben Franklin Station
Washington, D.C. 20044-0875
Telephone: (202) 514-9038
Facsimile: (202) 307-0494
Attorneys for the United States of America

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION**

In re

CITY OF SAN BERNARDINO,
CALIFORNIA,

Debtor.

RAYMOND NEWBERRY; PATRICIA
MENDOZA; MARIA ABOYTIA;
JUANA PULIDO; JESUS PULIDO;
JONATHAN PULIDO; RICHARD
GONZALEZ LOZADA; MELINDA
MCNEAL; BERTHA LOZADA;
MILDRED LYTWYNEC; NICHOLAS
LYTWYNEC; GLORIA BASUA;
LIZBETH BANUELOS; CARLOS
OCHOA,

Appellants,

V.

CITY OF SAN BERNARDINO,
CALIFORNIA,

Appellee.

Case No. 5:15-cv-01672-ODW

Bankr. Case No. 6:12-bk-28006-MJ

**BRIEF OF INTERVENOR THE
UNITED STATES OF AMERICA
ON THE CONSTITUTIONALITY
OF 11 U.S.C. §§ 362 AND 922**

Date: N/A

Time: N/A

Place: N/A

Honorable Otis D. Wright, II
United States District Judge

1 The United States of America, as intervenor in the above captioned appeal,
 2 hereby files its brief addressing the constitutionality of sections 362 and 922 of title 11
 3 of the United States Code (“Bankruptcy Code”).

4 **PROCEDURAL BACKGROUND**

5 Appellants (together “Newberry”) have appealed an Order of the United States
 6 Bankruptcy Court for the Central District Court of California (“Bankruptcy Court”) denying Newberry’s two motions for relief from the automatic stay imposed by
 7 sections 362 and 922 of the Bankruptcy Code. (ECF No. 6). The two motions sought
 8 relief from the automatic stay for Newberry to continue an action filed in this Court
 9 against the City of San Bernardino and certain of its officers, among others, pursuant
 10 to 28 U.S.C. § 1201 and 42 U.S.C. § 1983 for declaratory and injunctive relief as well
 11 as damages and fees and costs arising from violations of Newberry’s Fourth
 12 Amendment rights (“Section 1983 Action”).

13 In his opening brief in this appeal (ECF No. 7), Newberry argued, among other
 14 things, that sections 362 and 922 violate his First Amendment right to petition the
 15 government to redress the alleged violations of his Fourth Amendment rights.
 16 *Plaintiffs-Appellants’ Opening Brief* at 30. Consequently, and pursuant to Rule 5.1 of
 17 the Federal Rules of Civil Procedure, Newberry filed a *Notice of Constitutional*
 18 *Challenge to 11 U.S.C. § 362 and § 922 and Request for Certification Pursuant to 28*
 19 *U.S.C. § 2403(a)* (“Notice”) (ECF No. 11) alleging that the City of San Bernardino
 20 (“City”) “has engaged in an unconstitutional use of generalized warrants to violate the
 21 Fourth Amendment rights of its citizens in minority and poor communities, and
 22 threatens to continue do so with impunity.” *Notice* at 2. Newberry further claimed
 23 that sections 362 and 922 violate his First Amendment right to petition the
 24 government to redress this conduct because they stay all causes of action against the
 25 City and its officers. *Id.* The Court then issued its *Order Certifying Constitutional*
 26 *Challenge* (“Certification Order”) (ECF No. 12) certifying Newberry’s constitutional
 27 challenge and providing the United States 60 days to intervene in this appeal.
 28

1 In response to the Certification Order, the United States moved to intervene as
 2 of right pursuant to 28 U.S.C. § 2403. (ECF No. 17). By Order dated January 5, 2016
 3 (“Intervention Order”), the Court granted the United States’ motion giving the United
 4 States leave to intervene in this appeal pursuant to Rule 24 of the Federal Rules of
 5 Civil Procedure for the purpose of addressing the constitutionality of sections 362 and
 6 922 of the Bankruptcy Code. (ECF No. 20). In response to the Intervention Order,
 7 the United States files this brief to defend the constitutionality of sections 362 and
 8 922.¹

9 **STATUTORY BACKGROUND**

10 I. The Automatic Stays of Sections 362 and 922

11 Section 362 of the Bankruptcy Code is entitled “Automatic Stay” and provides,
 12 in relevant part, that a bankruptcy petition “operates as a stay, applicable to all
 13 entities, of (3) any act to obtain possession of property of the estate or of property
 14 from the estate or to exercise control over property of the estate.” 11 U.S.C. §
 15 362(a)(3). Section 362 applies in chapter 9 proceedings like the City’s. 11 U.S.C. §
 16 901(a). Moreover, and in addition to section 362’s stay, section 922 provides that the
 17 filing of a petition under chapter 9 operates as a stay of the commencement or
 18 continuation of actions “against an officer or an inhabitant of the debtor that seeks to
 19 enforce a claim against the debtor.” 11 U.S.C. § 922(a). “The additional automatic
 20 stay provided by section 922(a) of the Bankruptcy Code stays actions directed against
 21 entities other than the municipality itself. This contrasts with the automatic stay of
 22 section 362, which prevents only acts against the debtor or its property. The stay of
 23
 24

25 ¹ The United States takes no position on the other issues raised in this appeal such as
 26 whether the stays of sections 362 and 922 apply to the Section 1983 Action or if
 27 cause exists under section 362(d)(1) to lift the stay of those sections. Also, in
 28 response to this Court’s January 14, 2016 order regarding supplemental briefing
 (ECF No. 21), the United States takes no position on whether Newberry’s request
 for declaratory and injunctive relief in the Section 1983 Action is moot, and if so,
 whether that action presents a colorable claim for relief.

1 Section 922 is in addition to the section 362 stay, not in lieu of it.” 6 *Collier on*
 2 *Bankruptcy* at ¶ 922.02 (Alan N. Resnick & Henry J. Sommer eds. 16th ed. 2015).

3 Section 362(d) permits a party to move for relief from the automatic stay of
 4 subsection (a) upon a showing of “cause,” 11 U.S.C. § 362(d), which the Bankruptcy
 5 Code does not define and the determination of which rests in bankruptcy courts’
 6 sound discretion, *Benedor Corp. v. Conejo Enters., Inc., (In re Conejo Enters., Inc.)*,
 7 96 F.3d 346, 351-52 (9th Cir. 1996). Subsection 362(d) applies to the section 922(a)
 8 stay the same as it applies to the stay of section 362(a). 11 U.S.C. § 922(b).

9 II. The First Amendment Right to Petition the Government

10 The First Amendment provides, in relevant part, that “Congress shall make no
 11 law . . . abridging . . . the right of the people . . . to petition the Government for a
 12 redress of grievances.” U.S. Const. amend. I (“Petition Clause”). “[T]he right to
 13 petition extends to all departments of the Government. The right of access to the
 14 courts is indeed but one aspect of the right to petition.” *Cal. Motor Transp. Co. v.*
 15 *Trucking Unlimited*, 404 U.S. 508, 510 (1972); *Bill Johnsons Rests. v. Nat’l Labor*
 16 *Relations Bd.*, 461 U.S. 731, 741 (1983) (same). This right applies to both citizens or
 17 groups of them, *Cal. Motor Transp.*, 404 U.S. at 510, and “is cut from the same cloth
 18 as the other guarantees of [the First] Amendment, and is an assurance of a particular
 19 freedom of expression,” *McDonald v. Smith*, 472 U.S. 479, 482 (1985).

20 The right to petition is not, however, absolute. *McDonald*, 472 U.S. at 484. As
 21 it pertains to the right of access to the courts, the Petition Clause essentially entails
 22 “the right to pass through the courthouse doors and present one’s claim for judicial
 23 determination.” *Los Angeles Cty. Bar Ass’n v. Eu*, 979 F.2d 697, 706 (9th Cir. 1992).
 24 “But nothing in the First Amendment entitles [a] plaintiff to a favorable disposition of
 25 his claim. The First Amendment safeguards only a citizen’s right to *express* his
 26 grievance to a tribunal of competent jurisdiction.” *Patchak v. Jewell*, 109 F. Supp. 3d
 27 152, 164 (D.D.C. 2015) (citations omitted) (emphasis in original); *see also Canfora v.*
 28 *Olds*, 562 F.2d 363, 364 (6th Cir. 1977) (“Neither in the First Amendment nor

1 elsewhere in the Constitution is there a provision guaranteeing that all petitions for the
 2 redress of grievances will meet with success.”); *Petersen v. Cazemier*, 164 F. Supp. 2d
 3 1217, 1225 (D. Or. 2001) (“Plaintiff is not guaranteed redress, simply the right to seek
 4 it.”).

5 ARGUMENT

6 Sections 362 and 922 Do Not Violate the Petition Clause

7 Newberry asserts that if “the automatic stay provisions [of sections 362 and
 8 922] protect the actions of the City from suit on all causes of action, then those
 9 provisions . . . are an unconstitutional breach of the First Amendment right of
 10 Appellants to petition the government.” *Plaintiffs-Appellants’ Opening Br.* at 30.
 11 Newberry cites no authority supporting this assertion, which assertion is simply
 12 wrong.

13 First, the assertion rests on a false premise, i.e., that sections 362 and 922
 14 protect the City from suit on all causes of action. They do not. Rather, those stays
 15 serve as a temporary reprieve from causes of action. *Fed. Trade Comm’n v. First*
 16 *Alliance Mortgage Co. (In re First Alliance Mortgage Co.)*, 264 B.R. 634, 645 (C.D.
 17 Cal. 2001) (“The purpose of the stay is to centralize all litigation involving the debtor
 18 in one court in order to grant the debtor temporary relief from creditors, prevent
 19 needless dissipation of the debtor’s estate, and allow for reorganization or liquidation
 20 in the most efficient manner possible.”). They are not permanent injunctions and
 21 expire at the earlier of the closure of the case, the dismissal of the case, or the grant of
 22 a discharge, 11 U.S.C. § 362(c)(2), which in chapter 9 occurs when the court confirms
 23 a plan of adjustment, 11 U.S.C. § 944(b). Hence, sections 362 and 922 alone do not
 24 permanently bar Newberry’s cause of action against the City and its officers and
 25 therefore, cannot violate his rights under the Petition Clause.²

26 ² When a court grants a discharge, the permanent injunction of section 524(a)(2)
 27 replaces the automatic stay. *Watson v. Shandell (In re Watson)*, 192 B.R. 739, 749
 28 (9th Cir. B.A.P. 1996), *aff’d*, 116 F.3d 488 (9th Cir. 1997). In the City’s chapter 9
 case, Newberry has filed a complaint objecting to the dischargeability of the City’s
 debt to him. *Request for Judicial Notice* (“RJN”) (ECF No. 15) Ex. 8 at 63.
Continued on next page

1 Second, by their own terms, the statutory stays of sections 362 and 922 provide
 2 a mechanism to seek redress from a federal court via a motion to lift stay made to a
 3 bankruptcy court. 11 U.S.C. §§ 362(d), 922(b). Indeed, this proceeding itself is
 4 Newberry's appeal of the Bankruptcy Court's denial of two such motions. But the
 5 Petition Clause guarantees only the right to seek redress and not success. Neither
 6 section 362 nor 922 bars Newberry's access to the courts or curtails his ability to
 7 present his grievances to this Court, namely, that the Bankruptcy Court erred when it
 8 decided that the stay of those sections did not apply to the Section 1983 Action or,
 9 alternatively, that cause did not exist to lift those stays if they do apply. *Plaintiffs-*
 10 *Appellants' Opening Br.* at 8 (Statement of Issues).

11 Third, the Bankruptcy Code affords Newberry other rights that vindicate his
 12 Petition Clause rights. For example, he can file a proof of claim in the City's
 13 bankruptcy for the alleged damages arising from the violations of his Fourth
 14 Amendment rights. 11 U.S.C. § 501(a) ("A creditor . . . may file a proof of claim.");
 15 *id.* at § 502(a) ("A claim . . . proof of which is filed under section 501 of this title, is
 16 deemed allowed, unless a party in interest . . . objects."); *id.* at § 502(b) ("[I]f such
 17 objection to a claim is made, the court, after notice and a hearing, shall determine the
 18 amount of such claim."). If a claimant, such as Newberry, does not want a bankruptcy
 19 court determining its claim, it has the right to seek withdrawal of that determination to
 20 the district court for cause shown. 28 U.S.C. § 157(d). Second, Newberry can file an
 21 adversary proceeding in the City's bankruptcy to determine the nondischargeability of
 22 his alleged claim, which he has done. RJN Ex. 8. Notwithstanding the temporary
 23 stays imposed by sections 362 and 922, Newberry has redress under the Bankruptcy
 24 Code to have a court adjudicate the grievances raised in the Section 1983 Action. For
 25 that reason, those sections do not violate his Petition Clause rights.

26
 27 Newberry's filing of this nondischargeability complaint further evidences that
 28 sections 362 and 922 do not violate his Petition Clause rights.

1 Finally, Congress does not violate the Petition Clause when it statutorily
 2 eliminates, as opposed to stay temporarily, a cause of action. *Jones v. Air Line Pilots*
 3 *Ass’n*, 713 F. Supp. 2d 29, 37 (D.D.C. 2010). In *Jones*, a former airline pilot
 4 challenged the constitutionality of the Fair Treatment of Experienced Pilots Act
 5 (FTEPA) for violating, among others, the Petition Clause in the United States
 6 Constitution because it barred his age discrimination claims for airlines’ actions
 7 occurring prior to FTEPA’s enactment. In rejecting the challenge, the court held that
 8 “FTEPA may eliminate Jones’s statutory claims for age discrimination, but narrowing
 9 the scope of statutory rights is entirely within Congress’s powers.” *Jones*, 713 F.
 10 Supp. 2d at 37 (citing *Logan v. Zimmerman*, 455 U.S. 422, 432 (1982)). If Congress
 11 can eliminate a cause of action without violating the Petition Clause, it can certainly
 12 exercise the lesser power of placing a temporary stay on a cause of action without
 13 violating that clause, especially when in the same statute, as explained above, it
 14 provides additional means for accessing the courts to have the underlying grievances
 15 addressed. Accordingly, sections 362 and 922 do not violate the Petition Clause.

16 CONCLUSION

17 For all the foregoing reasons, sections 362 and 922 of the Bankruptcy Code are
 18 constitutional, and the Court should reject Newberry’s constitutional challenge.

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1 Date: February 4, 2016

Respectfully submitted,

3 BENJAMIN C. MIZER
Principal Deputy Assistant Attorney
4 General
RUTH A. HARVEY
5 Director
TRACY J. WHITAKER
6 Assistant Director
/s/ *Matthew J. Troy*
7 MATTHEW J. TROY
Senior Trial Counsel
8 Civil Division, Commercial Litigation
Branch
9 U.S. Department of Justice
P.O. Box 875, Ben Franklin Station
10 Washington, D.C. 20044-0875
Telephone: (202) 514-9038
11 Facsimile: (202) 307-0494
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CERTIFICATE OF SERVICE

I am over the age of 18 and not a party to this proceeding. My business address is:
USDOJ, Civil Division, POB 875 Ben Franklin Station, Washington, DC 20044-0875.

A true and correct copy of the foregoing document **Brief of Intervenor the United States of America on the Constitutionality of 11 U.S.C. §§ 362 and 922** was served via electronic mail upon all parties in this case receiving electronic notice under the Court's CM/ECF system.

Date: February 4, 2016

/s/ Matthew J. Troy
Matthew J. Troy